CTAP CASELAW UPDATES[1] – AUGUST 2008

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Planning, Zoning and Subdivision Law

Cutthroat Creek, LLC v. Lake County Bd. of Adjustment (District Court of the Twentieth Judicial District, Lake County, August 12, 2008)

Summary: Variance from setbacks and slope limitations in applicable zoning regulations was reasonable and supported by the evidence in the record, where the owners demonstrated that topographical conditions on the property limited their ability to construct a residence, and opponents failed to demonstrate with specificity any injury or harm resulting from issuance of the variance.

Property owners in the Lower Bug Zoning District applied for variances to several development requirements of the zone that would have allowed them to build within 35 feet of Swan Lake, within 20 feet of neighboring properties, and on slopes greater than 25%. The Lake County Board of Adjustment denied the variances, citing issues regarding sanitation restrictions and slope stability.

The property owners returned with a modified variance request to one property line only, allowing them to build within 16 feet of their western neighboring property. The owners reasoned that because the property was small, strict compliance with the setback requirements would require them to build entirely on slopes greater than 25%. After holding a public hearing and receiving public comments and testimony, the Board voted to approve the variance, conditioned on the County's approval of a storm water drainage plan for the property. The plan was completed and the County issued the Zoning Conformance Permit to construct the residence. After the Board's approval of the variance, neighboring landowners filed a petition against the Board.

Recognizing its duty to review the Board's decision for an abuse of discretion, the Court examined the record to determine "whether the information upon which the Board has based its decision is so lacking in fact and foundation as to be clearly unreasonable." (Citing *North 93 Neighbors*.) The evidence provided by the owners and their engineer showing the topographical limitations of the property, the lack of any specificity by the opposition as to the injury or harm likely to result to current or future owners as a result of the variance, and staff's testimony that their were no alternative building sites available and that the variance would not detrimentally

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affect neighboring views was sufficient evidence to support the Board's decision to grant the variance. The Court rejected the plaintiffs arguments that the Board was required to consider all available alternative site plans, that it must conduct a cost-benefit analysis, or that it require mitigation by the applicant.

In addition, because plaintiffs had not alleged that the proposed development lay within – or even close to – 20 feet of the mean high-water mark of the lake, neither the state's Lakeshore Protection Act or the County's local lakeshore protection regulations applied.

The Court also rejected plaintiffs' request for monetary damages, noting such relief is available only under the Subdivision and Platting Act, not in the case of a decision to approve a zone variance.

Country Highlands HOA v. Bd. of County Commissioners of Flathead County (Montana Supreme Court, 2008 MT 286, on appeal from the Eleventh Judicial District, Flathead County, August 12, 2008)

Summary: Montana Supreme Court dismisses a complaint alleging certain zoning amendments were inconsistent with County's growth policy, finding the claims were mooted by the intervening adoption of a new growth policy.

Property owners Granite Holdings first sought and obtained from the County in 2003 a zone change for their property from Agricultural-40 to Suburban Agricultural-5. While that zone change was pending, Granite Holdings proposed and received approval for a subdivision and a Planned Unit Development (PUD) for the property, creating 52 lots for suburban agricultural residential and general business commercial development.

After this approval, a neighboring homeowners group sued the County, alleging the approvals were improper. While the case was pending, Granite Holdings sought and obtained from the County an amendment to the Growth Policy redesignating the property, and adjacent areas now also owned by Granite, from agricultural use to residential and commercial. After the County adopted the Growth Policy amendment, Granite Holdings sought and obtained a zone change from agricultural and suburban agricultural to Residential-2 and General Business-2.

The homeowners group amended its complaint in response to these approvals, alleging the Growth Policy and zone amendments were invalid and inconsistent with each other. The District Court ruled in favor of the County on all of the claims. Pending appeal of the decision, the County adopted a new Growth Policy and reenacted all existing zoning districts.

The Montana Supreme Court dismissed the complaint in its entirety, finding the claims moot. Even if the Court ruled that the County had improperly amended the old Growth Policy with respect to Granite's properties, the contested zoning amendments were readopted under the new Growth Policy. Since the question of whether the zoning amendments were consistent with the new Growth Policy was not alleged by the parties, the Court dismissed the suit.

Ballas v. Missoula City Board of Adjustments (District Court of the Fourth Judicial District of Montana, Missoula County, August 20, 2008)

Summary: City violated mandatory zoning and subdivision regulations in approving a boundary line relocation that created lots smaller than the minimum required lot size in the zoning district. Informal departmental density infill policy did not allow the City to disregard its adopted zoning requirements.

Owners of contiguous lots (Lots 14 and 15) lived in one house on Lot 14 and sought to build a second house on Lot 15. Each lot was approximately 4170 sq. feet; both lots together totaled 8,340 square feet. When the lots were annexed into the City, they were designated residential "A," requiring a minimum lot size of not less than 5800 sq. feet, later modified to not less than 5400 sq. feet.

When the landowners sought to build the second house in 2003, the applicable zoning required either an additional 2,460 square feet to comply with the existing ordinance, or an approved variance request. Instead, the landowners submitted and obtained an exemption from subdivision review for a boundary line relocation, and a certificate of survey was recorded creating new Lots 14A and 15A. These lots were not considered legally nonconforming, as they were created after the minimum lot size requirements were in effect. Although required under the City's zoning ordinance, no zoning review was conducted by the City as part of the review of the subdivision exemption, and the City did not make a determination as to the legal nonconformity of the proposed lot reconfiguration or the proposed change, if any, that reconfiguration would have on the nonconformity. Instead, following an unadopted and informal department policy of encouraging infill in existing neighborhoods, the City issued a building permit to the landowners for the second house after the boundary line relocation relocation was recorded. The landowners built the new house on Lot 15A, and subsequently tore down the first house on Lot 14A. Meanwhile plaintiff, a neighbor and city commission member, filed an appeal of the City's decisions.

The district court found the City's actions unlawful. The court held that the city failed to find whether the relocated lots were legal nonconforming, whether the relocation proposal would result in an increase in the nonconformity, and improperly followed an informal policy that had never been adopted by the City Commission. While the Court recognized that limited relief could be granted to the plaintiff at the time of the decision, as the city had already amended its ordinances and the house had been built, the Court ordered the City to pay plaintiff's attorney's fees and costs.

Shanks v. Dressel (9th Circuit Court, on appeal from the U.S. District Court for the Eastern District of Washington, August 27, 2008)

Summary: Failure of a city to review a proposed development for its suitability with the surrounding designated historic neighborhood as required under local land use ordinances, or the issuance of a building permit without requiring such review, did not meet the "exceedingly high burden" necessary to establish a violation of substantive due process (14th Amendment) under the rational basis standard applicable to challenges of local land use decisions. Further, no procedural process (hearing,

opportunity for public participation) was due to the plaintiffs, because the City's historic landmarks ordinance did not contain mandatory language that significantly constrained the City's discretion.

The City of Spokane's Historic Landmarks Commission is charged with the "stewardship of historic and architecturally-significant properties . . ." in the City. Among others, the Commission's responsibilities are to review permit applications for "certificates of appropriateness" for development or new construction within any historic district using the Secretary of the Interior's Standards for Rehabilitation. The Commission is also charged with reviewing requests for "administrative special permits" outlining development standards for work proposed in historic districts for which "defining characteristics" had been prepared by the Commission, or for those structures or properties listed in the National Register of Historic Places. Nevertheless, the Commission was authorized to negotiate "different management standards" with the owner for a specific piece of property, subject to the approval of the City Council, and the director of the City's planning department was authorized to come to a different conclusion than that of the Commission.

The City of Spokane issued building permits for a student dormitory addition to a residential home located in a nationally listed historic residential district north of Gonzaga University. Despite this historic property review scheme, no review of any kind by the Commission took place prior to the development at issue in the suit – the landowner did not request such review nor did the City require them to undergo it.

In response to the issuance of the building permit, a neighborhood group sued for violations of due process, state law, and the National Historic Preservation Act, claiming the development had compromised the character of the district and harmed its "cultural, architectural, educational, recreational, aesthetic, historic, and economic interests." The district court granted the City's motion for summary judgment, and the appellate court agreed.

First, the appellate court reiterated that, in light of *Lingle v. Chevron*, 544 U.S. 528, 532 (2005) and *Crown Point Development v. City of Sun Valley,* 506 F.3d 851, 856 (9th Circ. 2007) a constitutional claim for a violation of due process under the 5th and 14th Amendments to the Constitution is no longer considered subsumed by the Takings Clause. (See discussion of *Crown Point Development,* CTAP Legal Updates, November 2007.)

Second, the Court held that the plaintiffs as a threshold matter could not prevail on a substantive due process claim because neither the City's purported failure to protect the historic character of their neighborhood nor its failure to require Commission review of the proposed development amounted to a constitutionally protected life, liberty or property interest of which they were deprived. (Citing *Action Apartment Association v. Santa Monica Rent Control Board*, 509 F.3d 1020, 1025 (9th Circ. 2007); see discussion of *Action Apartment*, CTAP Legal Updates, December 2007.)

Moreover, the Court reiterated the "exceedingly high burden" necessary to establish a violation of substantive due process, and the rational basis standard applicable to due process claims not involving fundamental rights:

> "…the 'irreducible minimum' of a substantive due process claim challenging land use action is failure to advance any legitimate governmental purpose." (*Citing North Pacifica LLC v. City of Pacifica*, 526 F.3d 478, 484 (9th Cir. 2008) [*See* discussion of *North Pacifica*, CTAP Legal Update, May 2008].) … "[O]nly 'egregious official conduct can be said to be "arbitrary in the constitutional sense" ': it must amount to an 'abuse of power' lacking any 'reasonable justification in the service of a legitimate governmental objective.'"

Under this standard, the failure of the Landmarks Commission to review the residential addition, and the City's issuance of the building permit without requiring such review, "falls short of being constitutionally arbitrary." In the absence of any evidence that there was a bias, malice, or some other pretext for the City's action, the Court found that it was at least fairly debatable that the City had a legitimate interest in residential development in a residential district that would be furthered by the issuance of a building permit.

Third, the Court rejected the neighbor's procedural due process claim, reiterating that only rules and regulations that support legitimate claims of entitlement give rise to protected property interests. Because Spokane's historic preservation provisions did not contain mandatory language that significantly constrained the City's discretion, no procedural process was due to the plaintiffs.

Finally, the Court rejected the National Historic Preservation Act claims, noting that the federal statute does not provide for a private right of action against governmental agencies.

Kila-Smith Lake Community Development Coalition, Inc. v. Bd. of County Commissioners of Flathead County (District Court of the Eleventh Judicial District, Flathead County, August 28, 2008)

Summary: District Court invalidated preliminary plat approval for a 74-lot subdivision, due to inadequacy of environmental assessment, inconsistency of the proposal with the County's growth policy, improper deferral of analysis of water, wastewater, and solid waste issues by the local agency, and failure to meet statutory deadlines.

Neighbors challenged the County's approval of the Haskill Mountain Ranch subdivision, a 74-lot residential subdivision at densities ranging from 2½ to 30-acre lots (with the majority of lots less than 10 acres) near the rural community of Kila outside of Kalispell.

The District Court first held that the neighbors had standing to challenge the subdivision as aggrieved landowners, and that the coalition had associational standing to bring suit on behalf of those neighbors. In particular, the Court found that adjacent landowners were "aggrieved" within the meaning of the Montana Subdivision and Platting Act (MSPA) because the traffic, gravel roads, individual septic systems, and density of the proposed subdivision would adversely and materially affect their properties.

Next, relying heavily on the affidavit of the coalition's engineering expert, the District Court held that the Environmental Assessment (EA) conducted for the subdivision, as required by both the MSPA and the County's local subdivision regulations, was sorely deficient in numerous areas. With respect to analysis of the proposed sewage treatment plans for the development, the EA failed to follow the local subdivision regulation requirements to illustrate where the sewage treatment systems would be located for 9 of the proposed lots; failed to include the required number of percolation test holes; improperly clustered the test holes in one area of the proposed subdivision; failed to disclose the depth of groundwater or bedrock on the site; and failed to include available County groundwater monitoring results.

With respect to water supply, the EA failed to follow both statutory and local regulation requirements to include on a map the proposed location of each well and the separation zones between the well and proposed septic system for each lot. The EA also used nitrate sensitivity analysis that failed to conform to state requirements, and relied on outdated water samples from locations 20 to 40 miles away from the site. The Court held the EA also failed to follow local regulation requirements to include publicly available information indicating severe limitations at the site for on-site sewage disposal, and failed to illustrate on a map the rock outcroppings and steep slopes that would constrain development of the property.

With respect to wildlife, the EA failed to follow statutory and local regulation requirements to disclose the fish and wildlife species that use the area proposed for development, or to identify habitat for certain species of concern or threatened species found in the area. The EA also failed to propose measures to protect that habitat or minimize its degradation, and failed to identify the site as designated big game winter range.

The District Court also held the approval of the proposal violated MSPA and local regulation requirements that subdivisions comply with the growth policy for the jurisdiction, since the County's Master Plan recommended development of big-game winter range at no more than one unit per 20 acres. The Court emphasized that the development proposed only 6 lots greater than 10 acres, a density that "far exceeds that recommended by the Growth Policy and the Master Plan" for big game winter range.

The District Court also found that the County had failed to adopt subdivision standards for water supply, sewage, and solid waste disposal, as statutorily required (Section 76-3-504, MCA), which resulted in the County's failure to consider such information in deciding whether to approve the subdivision proposal. Citing the recent Montana Supreme Court decision *Flathead Citizens for Quality Growth v. Flathead County Bd. of Adjustment*, 2008 MT 1 (see *CTAP Legal Update January 2008*), the district court emphasized that the local reviewing agency must be provided with and consider the water, sewer, and solid waste information for a proposed subdivision prior to approval – it cannot rely on anticipated future Department of Environmental Quality (DEQ) action alone.

Finally, the district court held that the preliminary plat approval was invalid, as the County's failed to act on the application within the statutory 60 day timeline (Section 76-3-604(4), MCA).

Environmental Law

Cameron Springs, LLC v. Montana Dept. of Environmental Quality (District Court of the First Judicial District of Montana, August 18, 2008)

For a summary of the facts of this case, see *CTAP Legal Update April 2008*.

The court stayed its previous order requiring DEQ to issue the mining permit.

Real Property

United States v. Park (9th Circuit Court, on appeal from the U.S. District Court for the District of Idaho, August 11, 2008)

Summary: 9th Circuit court held that the lack of a definition for "livestock farming," or a reference to state law in a restrictive real property easement precluded judgment against the landowner, who was operating a dog training and kennel facility that arguably qualified as "livestock farming" with the plain dictionary meaning of those terms.

Owners of real property along the designated scenic Clearwater River began operating a commercial dog training and kennel facility. The property was subject to a scenic easement held by the United States Forest Service, that restricted use of the property to "general crop and livestock farming and for limited residential development consistent with applicable State and local regulations." The owners had purchased the property subject to the easement, and over time had received the Forest Service's approval for building modifications, construction of horse stalls, convert a portion of their residence to a craft and hobby shop, and operate a bed a breakfast.

When it learned of the commercial dog kennel business, the Forest Service notified the owners that they were in violation of the easement. The owners continued to operate the business, and in 2005, the Forest Service filed suit. The Forest Service argued on summary judgment that the dog kennel could not constitute "livestock farming," and the federal district court for Idaho agreed. The lower court held that the terms "livestock farming" was unambiguous, and that under Idaho law, dogs are not livestock.

The 9th Circuit court reversed, holding that the terms of the easement were ambiguous and that summary judgment had been improperly granted. After review of various dictionary sources, the Court found that "livestock" is "sweeping, capturing every type of domesticated animal." Likewise, the term "farming" was commonly defined as "to engage in raising crops or animals." Finally, the Court held that the limitation in the easement, "consistent with applicable State and local regulations," referred only to the residential development clause, not the livestock farming clause. Because the easement had not specifically referenced state law or definition in the easement, the Court held the plain dictionary meaning of the terms applied, and that dogs could be considered livestock under those definitions.